# Malaysian Shipping Agencies Sdn Bhd v MTC Engineering Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-139–01 OF 2018
ZABARIAH YUSOF, HARMINDAR SINGH AND NOR BEE ARIFFIN JJCA
18 JUNE 2019

*Contract — Termination — Wrongful termination — Whether reasons for termination of contract were flawed — Whether plaintiff entitled to damages for wrongful termination — Whether High Court erred in law and in fact in finding the termination to be valid*

Petronas Carigali Sdn Bhd awarded a contract ('the Petronas contract') to the respondent ('MTCE') to supply, deliver, install, commission, operate and maintain an extended well test ('EWT') system at two oilfields in the open sea off Bintulu. The system could ascertain the quantity of oil that could be produced from a seabed oil well. This would help determine whether it was profitable to invest in drilling in that particular oil well. Several stages were involved in the installation of the EWT system including putting in place a buoy, akin to a floating jetty, at the site of the oil well so that vessels could moor to collect oil drilled up from the seabed well and take it to shore. Six chains would anchor the buoy to the seabed. The chains had to have a certain degree of tension which was achieved by using a stevtensioner. MTCE hired several subcontractors, including the appellant, to carry out the Petronas contract. The subcontract with the appellant ('the MTCE contract') was for the latter to provide vessels, cargo and manpower for the installation of the buoy at one of the oilfields. The job was to take 26 days and the appellant was required to comply with an installation procedure ('the IP') devised by MTCE's related company, MTCS, containing specifications and methodology, including the types of vessels that should be used, the procedures for the anchoring of the buoy to the seabed and the stevtensioning procedure. The IP provided that the offshore construction works should be managed/overseen by an offshore construction manager ('OCM') who had to be a MTCS representative. MTCE also engaged an independent marine surveyor company ('IMEC') to oversee the installation. The installation of the buoy came to a standstill during the pre-tensioning phase because the chains to secure the buoy could not be hooked up to the stevtensioner and the chain anchors, although dropped into the sea, had not fastened to the seabed. MTCE terminated its contract with the appellant contending that the vessels used by the appellant were not suitable to carry out the job; that the appellant did not deploy other vessels suggested by MTCE to resolve the problem encountered in the pre-tensioning phase; and

that the appellant had delayed in completing the works. The appellant, on the other hand, contended that the termination was unlawful because: (a) the problem was caused by the chains provided by MTCE being too short so that they could not be hooked up to the stevtensioner; and (b) it was not part of the appellant's contract to commission the buoy. The appellant sued MTCE for losses and damages it incurred from the termination of the contract. MTCE counterclaimed for loss of income and damages including monies it had to pay a third party to complete the works. It maintained that the appellant's failure to commission the buoy was a breach of contract entitling it to terminate. The High Court dismissed the appellant's claim and allowed the counterclaim. The Court found that the appellant was contractually bound to commission the buoy and breached the contract in failing to do so; that its allegation of insufficient length in the chains was not proven; that the appellant's use of a vessel that had insufficient power to pull the chains to be hooked-up to the stevtensioner contributed to the failure to hook-up; that the OCM in the present case was not MTCE's agent but the appellant's and his act of causing the chain anchors to be dropped away from their designated spots was another breach of contractual duty attributable to the appellant. The instant appeal was against the High Court's decision.

**Held,** unanimously allowing the appeal, setting aside the High Court's decision, granting judgment to the appellant, ordering damages to be assessed for wrongful termination of the contract and dismissing MTCE's counterclaim:

(1) The High Court was plainly wrong in coming to the conclusion that the appellant had breached the MTCE contract. The termination of the contract was without just cause and wrongful and the appellant was entitled to damages for wrongful termination (see paras 120–122).

(2) The termination was stated to be due to: (a) the appellant's alleged failure to change the marine spread (the vessels used); and (b) its delay in completing the works. With regard to the first ground, the trial judge erred in holding that the hook-up failed because the appellant's vessels were underpowered. The appellant had chartered the vessels stipulated under the installation procedure. Hence, any incapacity or under-power of the vessels was MTCE's fault. The trial judge mistakenly held that a vessel named Setia Jaguh used by the appellant was underpowered. The unchallenged evidence of the only expert at the trial, SP2, was that not only was Setia Jaguh not underpowered, it was never intended under the installation procedure to be used for tensioning. It was an anchor handling tug whose function was to pick up the anchor wire and connect it to the crane barge. With regard to delay, the termination letter said that the subcontract began on 6 March 2013. But the evidence showed that the loading-out instruction was only issued on 25 May 2013. Therefore, it was wrong to say the subcontract was not completed by 9 June 2013.

Further, the allegation that the appellant had demobilised the marine spread was also incorrect. It was MTCE's representative, Captain Hamzah, who demobilised the same on 13 July 2013 when he resigned (see paras 102–103, 105–107 & 118–119).

(3) The trial judge wrongly held that the appellant was contractually bound to commission the buoy. From the construction of the MTCE contract, the documentary and oral evidence and the factual matrix of the case, the appellant was only limited to providing the vessels and manpower for the EWT system. The appellant's scope of work was never to carry out the scope of work of the Petronas contract. It was illogical and erroneous for the trial judge to have held that after entering into a contract with the appellant for a far lesser price and scope of work, MTCE could elect to have the appellant bound by MTCE's contractual obligations under the Petronas contract. Clause 1 of the MTCE contract did not allow MTCE to elect which scope of work it wanted the appellant to perform. Clause 1 had no application in the instant case because the appellant and respondent never entered into a 'Terms and Conditions Agreement' as was originally intended; hence, there was no question of a conflict arising between that agreement and the Petronas contract in order for an election to be made between the two (see paras 63–64, 72–76 & 82–83).

(4) The trial judge's finding that there was sufficient chain length to perform the hook-up was not supported by any technical or expert evidence. SP2 was the only expert witness produced and his evidence and the IMEC report showed that due to insufficient chain length provided by MTCE, the hook-up could not be performed. Therefore, the trial judge's finding that the appellant had breached the contract in failing to complete the hook-up was not supported by evidence and was clearly erroneous (see para 93).

(5) The IMEC's reports and the daily progress reports of the works were sufficient to support the appellant's case that the OCM, Captain Hamzah, was MTCE's representative and not the appellant's agent (see paras 109–111 & 116).

**[Bahasa Malaysia summary**

Petronas Carigali Sdn Bhd telah mengawardkan kontrak ('kontak Petronas') kepada responden ('MTEC') untuk membekal, menghantar, memasang, mengkomisyen, beroperasi dan menyelenggara sistem Extended Well Test ('EWT') di dua telaga minyak di laut terbuka di luar Bintulu. Sistem ini dapat menentukan kuantiti minyak yang dapat dihasilkan dari sumur minyak dasar laut. Ini akan membantu menentukan sama ada ia menguntungkan untuk melabur dalam penggerudian di telaga minyak tertentu itu. Beberapa peringkat terlibat dalam pemasangan sistem EWT termasuk meletakkan boya itu, yang sama dengan jeti terapung, di tapak telaga minyak itu supaya kapal

A boleh berlabuh untuk mengumpul minyak yang digerudi dari dasar laut dan dibawa ke pantai. Enam rantaian akan melabuhkan boya itu ke dasar laut. Rantaian itu perlu mempunyai ketegangan tertentu yang dicapai dengan menggunakan alat penegangan. MTCE telah mengupah beberapa subkontraktor, termasuk perayu, untuk melaksanakan kontrak Petronas. B Subkontrak dengan perayu ('kontrak MTCE') adalah untuk perayu menyediakan kapal, kargo dan tenaga kerja untuk pemasangan boya di salah satu telaga minyak itu. Tugasnya mengambil masa 26 hari dan perayu dikehendaki mematuhi prosedur pemasangan ('IP') yang dibuat oleh syarikat berkaitan MTCE, MTCS, yang mengandungi spesifikasi dan metodologi, C termasuk jenis-jenis kapal yang sepatutnya digunakan, prosedur untuk melabuhkan boya ke dasar laut dan prosedur penegangan. IP itu memperuntukkan bahawa kerja-kerja pembinaan luar pesisir perlu diuruskan/diawasi oleh pengurus pembinaan luar pesisir ('MOM') yang merupakan wakil MTCS. MTCE juga melantik syarikat juruukur marin D ('IMEC') untuk mengawasi pemasangan. Pemasangan boya itu terhenti semasa fasa pra-penegangan itu kerana rantaian untuk memastikan boya itu tidak dapat disambungkan ke alat penegangan itu dan sauh rantaian itu, walaupun telah dilabuhkan ke dalam laut, tidak berlabuh ke dasar laut. MTCE menamatkan kontraknya dengan perayu dan berhujah bahawa kapal yang E digunakan oleh perayu tidak sesuai untuk menjalankan tugas itu; bahawa perayu tidak menggunakan kapal lain yang dicadangkan oleh MTCE untuk menyelesaikan masalah yang dihadapi dalam fasa pra-penegangan itu; dan bahawa perayu telah berlengah dalam menyelesaikan kerja-kerja. Sebaliknya, perayu berpendapat bahawa penamatan itu menyalahi undang-undang kerana: F (a) masalah itu disebabkan oleh rantaian yang disediakan oleh MTCE yang mana adalah terlalu pendek sehingga tidak dapat disambungkan kepada alat penegangan itu; dan (b) ia bukan sebahagian daripada kontrak perayu untuk mengkomisyenkan boya itu. Perayu menyaman MTCE untuk kerugian dan kerosakan yang ditanggungnya daripada penamatan kontrak itu. MTCE G menuntut balas kehilangan pendapatan dan ganti rugi termasuk wang yang ia perlu bayar pihak ketiga untuk menyelesaikan kerja-kerja itu. Ia menegaskan bahawa kegagalan perayu untuk mengkomisyenkan boya itu adalah pelanggaran kontrak yang mewajarkan ia ditamatkan. Mahkamah Tinggi menolak tuntutan perayu dan membenarkan tuntutan balas tersebut. H Mahkamah mendapati bahawa perayu terikat secara kontrak untuk komisyen boya itu dan telah melanggar kontrak itu kerana gagal berbuat demikian; bahawa tuduhan yang rantaian itu tidak cukup panjang tidak dibuktikan; bahawa penggunaan kapal oleh perayu yang tidak cukup kuasanya untuk menarik rantaian yang akan disambungkan kepada alat tegangan itu telah I menyumbang kepada kegagalan penyambungan itu; bahawa MOM dalam kes ini bukan ejen MTCE tetapi perayu dan perbuatannya yang menyebabkan rantaian sauh diturunkan bukan di tempat yang ditetapkan adalah satu lagi pelanggaran kewajipan kontraktual yang boleh dikaitkan dengan perayu. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

**Diputuskan,** membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi, memberikan penghakiman kepada perayu, memerintahkan ganti rugi untuk ditaksir bagi penamatan kontrak yang salah dan menolak tuntutan balas MTCE:

(1) Mahkamah Tinggi jelas terkhilaf apabila membuat kesimpulan bahawa perayu telah melanggar kontrak MTCE. Penamatan kontrak itu adalah tanpa seba yang adil dan salah dan perayu berhak mendapat ganti rugi untuk penamatan salah (lihat perenggan 120–122).

(2) Penamatan itu dinyatakan akibat daripada: (a) kegagalan perayu yang dikatakan untuk menukar penyebaran marin ('saluran yang digunakan') dan; (b) kelewatannya untuk menyiapkan kerja. Berhubung alasan pertama, hakim perbicaraan terkhilaf kerana memutuskan bahawa penyambungan itu gagal disebabkan kapal perayu kurang berkuasa. Berkenaan dengan alasan pertama, hakim perbicaraan itu sesat dengan menyatakan bahawa kaitan itu gagal kerana kapal perayu kurang berkuasa. Perayu telah menyewa kapal yang dinyatakan di bawah Prosedur Pemasangan. Justeru, apa-apa ketidakupayaan atau kekurangan kuasa kapal itu adalah kesilapan MTCE. Hakim perbicaraan terkhilaf dalam memutuskan bahawa kapal bernama Setia Jaguh yang digunakan oleh perayu kurang berkuasa. Keterangan yang tidak dicabar dari satu-satunya pakar semasa perbicaraan, SP2, adalah bukan sahaja Setia Jaguh yang tidak kurang berkuasa, ia tidak pernah dimaksudkan di bawah Prosedur Pemasangan untuk digunakan untuk penegangan. Ia merupakan penunda pengendalian sauh yang berfungsi untuk mengambil wayar sauh dan menghubungkannya ke kren baj. Berkenaan dengan penangguhan itu, surat penamatan itu mengatakan bahawa subkontrak bermula pada 6 Mac 2013. Namun keterangan menunjukkan bahawa arahan muatan hanya dikeluarkan pada 25 Mei 2013. Oleh itu, adalah salah untuk mengatakan subkontrak itu tidak selesai pada 9 Jun 2013. Selanjutnya, dakwaan bahawa perayu telah menghentikan penyebaran marin juga tidak betul. Ia adalah wakil MTCE, Kapten Hamzah, yang menghentikannya pada 13 Julai 2013 ketika dia meletak jawatan (lihat perenggan 102–103, 105–107 & 118–119).

(3) Hakim perbicaraan terkhilaf kerana memutukan bahawa perayu terikat secara kontrak untuk komisyen boya itu. Berdasarkan kontrak MTCE, bukti dokumentari dan lisan dan matriks fakta kes itu, perayu hanya terhad untuk menyediakan kapal dan tenaga manusia untuk sistem EWT. Skop kerja perayu tidak pernah untuk menjalankan skop kerja kontrak Petronas. Adalah tidak masuk akal dan salah bagi hakim perbicaraan untuk memutuskan bahawa selepas memasuki kontrak dengan perayu untuk harga dan skop kerja yang jauh lebih rendah, MTCE boleh memilih untuk mengikat perayu dengan obligasi kontrak

MTCE di bawah kontrak Petronas. Fasal 1 kontrak MTCE tidak membenarkan MTCE memilih skop kerja yang ia mahukan perayu untuk melaksanakan. Fasal 1 tidak terpakai dalam kes ini kerana perayu dan responden tidak pernah memasuki suatu 'Perjanjian Terma dan Syarat' sebagaimana yang dimaksudkan pada asalnya; Justeru, tiada persoalan mengenai konflik yang timbul antara perjanjian itu dengan kontrak Petronas agar pilihan dibuat antara kedua-dua (lihat perenggan 63–64, 72–76 & 82–83).

(4) Dapatan hakim perbicaraan bahawa terdapat rantaian panjang yang mencukupi untuk melakukan penyambungan tidak disokong dengan apa-apa keterangan teknikal atau pakar. SP2 adalah satu-satunya saksi pakar yang dikemukakan dan keterangannya dan laporan IMEC menunjukkan bahawa disebabkan oleh panjang rantaian yang tidak mencukupi yang disediakan oleh MTCE, penyambungan itu tidak dapat dilakukan. Oleh itu, hakim perbicaraan mendapati bahawa perayu telah melanggar kontrak kerana gagal menyelesaikan penyambungan itu tidak disokong oleh keterangan dan jelas salah (lihat perenggan 93).

(5) Laporan IMEC dan laporan kemajuan harian kerja adalah mencukupi untuk menyokong kes perayu bahawa MOM, Kapten Hamzah, adalah wakil MTCE dan bukan ejen perayu (lihat perenggan 109–111 & 116).]

**Notes**

For cases on wrongful termination, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 7580–7587.

**Cases referred to**

*Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, FC (refd)

*Heritage Grand Vacation Club Bhd v Pacific Fantasy Vacation Sdn Bhd* [2016] 4 MLJ 389, CA (refd)

*Lau Kee Ko & Anor v Paw Ngi Siu* [1974] 1 MLJ 21, FC (refd)

*Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors* [2008] 2 MLJ 256, CA (refd)

*SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464, FC (refd)

*Salomon v Salomon & Co, Ltd; Salomon & Co, Ltd v Salomon* [1897] AC 22, HL (refd)

*Shalini a/p Kanagaratnam v Pusat Perubatan Universiti Malaya (formerly known as University Hospital) & Anor* [2016] 3 MLJ 742, CA (refd)

**Appeal from:** Suit No 22 NCVC-387–07 of 2015 (High Court, Shah Alam)

*Shanti Morgan (Hee Hui Ting with him) (Shearn Delamore & Co) for the appellant.*

*Norazali bin Nordin (Danial Rahman bin Yang Razali and Mohamad Nizam bin Mohd Salleh with him) (Maxwell Kenion Cowdy & Jones) for the respondent.*

**Zabariah Yusof JCA:**

**[1]** The appeal before us is against the decision of the learned High Court judge dated 19 September 2017. The appellant claimed that there were fundamental errors committed by the High Court judge in dismissing the appellant's claim and allowing the respondent's counterclaim, hence the present appeal.

**[2]** After hearing the oral submissions and perusing through the written submissions of both parties and the appeal records, we found appealable errors on the part of the learned High Court judge in determining the case. Accordingly, unanimously we allowed the appeal with costs and set aside the order of the High Court. We now give our reasons for allowing the appeal.

**[3]** Parties will be referred to, as they were, in the High Court.

BACKGROUND

*The Petronas contract*

**[4]** Pursuant to a letter of award ('LOA') dated 21 September 2012, Petronas Carigali Sdn Bhd ('Petronas') awarded a contract to the defendant for the provision of supply, delivery, installation, commissioning, operation and maintenance of extended well test ('EWT') vessel and EWT system at two oilfields ('Petronas contract') (pp 1–8 CB1). This was to enable Petronas to test and produce oil at two projects ie in Kayu Manis South East ('KMSE') and Anjung Kecil ('AK') oilfields located offshore Bintulu.

**[5]** The contract awarded by Petronas to the defendant is for the defendant to perform all works in relation to the supply, delivery, installation, commissioning, operation and maintenance of EWT system at KMSE and AK oilfields. The complete contract between Petronas and the defendant has not been produced.

*The EWT system*

**[6]** The EWT system enables the user to ascertain the quantity of oil that can be produced from the seabed oil well so as to determine whether it is profitable to invest in drilling in that particular oil well. This requires the use of sea vessels as it takes place in open seas. The various vessels used are collectively known as 'marine spread'.

A **[7]** The installation of the EWT system involves several stages. The cause of the dispute between the plaintiff and the defendant arose in one of these earlier stages which is referred to as 'the tensioning stage'.

B **[8]** The learned High Court judge had outlined the process of installation of the EWT system, in her judgment, which we adopted with some modifications in our judgment herein.

C **[9]** Essentially, the location of the oil well is underwater in the seabed, which is known as the underwater well. Oil drilled from the underwater well will be brought up to above sea level by way of a pipeline. When the oil is brought to above sea level, the said oil will be transported to land by a sea vessel.

D **[10]** To facilitate the oil transfer, a CALM buoy ('buoy') will be floated to enable the vessels to moor pending the loading of the drilled oil onto the sea vessel. This buoy is akin to a floating jetty.

E **[11]** The buoy was to be secured in its position by six chains. One end of each of the chain was to be hooked to the buoy while the other end would be fastened to the seabed. The end attached to the buoy is referred to as the 'buoy end' and the other end of the same chain as the 'seabed end'. The seabed end has to be fastened to the seabed.

F **[12]** Two items are attached to the seabed end of the chains. They are an anchor and a clump. The clump is a heavy weight which serves two functions, namely to pull the anchor down to the seabed and to help to navigate the anchor to the desired position.

G **[13]** The anchor fastening process or the locking of the anchors to the seabed renders the anchors immobile. This process begins with dropping the seabed end of the chains into the sea. Once the anchors hit the seabed, the anchors will be dragged for a certain distance. Due to the combined weight of the anchor and the clump, the dragging will cause the anchor to sink and dig into the H seabed. Ultimately, upon the sinking into a certain depth, the anchor will lock into the seabed. The buoy end of the chains will then be attached to the buoy by way of a hook up.

I **[14]** The buoy must have some degree of mobility, which is necessary to enable the buoy to rotate and move when it is tossed around by strong winds and waves at open seas. In order to install a fixed and yet mobile buoy to accommodate the weather, these six chains must be fixed with a certain degree of tension. The appropriate tension is achieved by using a stevtensioner (this is the 'tensioning process').

*The contract between the plaintiff and the defendant*

**[15]** The defendant subsequently issued out a LOA dated 6 March 2013 whereby the defendant awarded a contract to the plaintiff to carry out part of the works required for the provision of transportation and installation of the EWT facilities system for the defendant at KMSE ('MTCE contract') (pp 9–17 of CB1). Essentially the defendant appointed the plaintiff as its subcontractor for the works. On 23 April 2013, the plaintiff acknowledged receipt of the LOA dated 6 March 2013 and confirm that it understood and shall fully abide by the conditions set therein (p 18 of CB1). At this juncture it is pertinent to note that the terms of the subcontract between the plaintiff and the defendant is as per the terms in the LOA dated 6 March 2013. The pleadings referred to this subcontract between the plaintiff and the defendant as the MTCE contract. For the purpose of this judgment we shall refer to this subcontract between the plaintiff and the defendant as the MTCE contract. The terms of this MTCE contact is as per the terms stated in the LOA dated 6 March 2013.

**[16]** The plaintiff's scope of work is set out in Appendix 2 to the MTCE contract (p 17 of CB1). The defendant issued an installation procedure containing specifications and the methodology for the project (pp 27–254 of CB1). Hence the plaintiff's scope of work involved a portion of the project. There is a baseline schedule setting out a 26 day timeline for works under the MTCE contract (the transportation and installation 'T&I works') which was prepared by the defendant (pp 256–257 of CB1).

**[17]** The defendant was to pay the plaintiff RM12.4m for the subcontract of the plaintiff, pursuant to Appendix 1 of the MTCE contract (p 16 of CB1). RM6.2m was paid by the defendant to the plaintiff. There is no dispute to this fact.

**[18]** The MTCE contract was then further subcontracted to Ardent Sea Tramp Sdn Bhd ('Ardent'), (Ardent contract) (pp 19–26 of CB1). The plaintiff paid RM15,498,499.91 to Ardent and its subcontractors for the works performed under the Ardent contract.

**[19]** The project envisages the installation of a CALM buoy offshore which is divided into few phases. The plaintiff loads all equipment offshore and mobilise all vessels to the KMSE site, sets up a crane barge (in this case TH 819) and deploys flowlines from the vessels to the TARPON (the pipe which transports oil). Thereafter six anchors with chains are dropped onto the seabed (chain laying) with the other ends picked up and hooked on to a stevtensioner, which is used to cross tension all six chains (stevtensioning). Subsequently an anchor handling tug (AHT) will hook up the CALM Buoy to the chains, completing the process, and the vessels will demobilise from KMSE.

*The installation procedure*

**[20]** The installation procedure is a document provided and prepared by MTC Subsea Sdn Bhd ('MTCS'), which is a related company of the defendant. It is a document which sets out, amongst others, the 'transportation and installation' (T&I) works, which are as follows:

(a) the offshore installation contractor/offshore construction manager ('OCM') to be a MTCS representative. The OCM has the responsibility of managing the offshore construction works (p 287 of P13);

(b) specified vessels named by the defendant to conduct different parts of the installation works (pp 304–307 of exh P13). The location of the six anchor drops and the procedure of laying the anchors on the sea bed (pp 341–344 of exh P13); and

(c) the stevtensioning procedure and the specifications of the stevtensioner (pp 345–346 together with p 396 of exh P13).

**[21]** The defendant was represented offshore. The OCM and the subcontractors carried out the works offshore and sent daily progress reports to the defendant, which documented the works carried out. The plaintiff received the daily progress reports, although not the full set (pp 103–230 of exh P13). The defendant also engaged an independent marine surveyor from Independent Marine and Engineering Consultants Sdn Bhd ('IMEC'). IMEC produced two reports, dated 10 June 2013 and 20 August 2013 (pp 87–101 of P12 and pp 231–258 of P16).

*The disputes and termination*

**[22]** The T&I works could not be completed within the 26 days as provided by the baseline schedule. However the parties continued to work beyond the 26 days. But the contract came to a standstill during the pre-tensioning phase, because the hook up of the chain to the stevtensioner could not be done. That was required to enable the stevtensioner to do the tensioning of the chains to enable the hook up of the CALM Buoy.

**[23]** The marine spread was demobilised when it left the site on two instances. At the first instance the marine spread returned to site. However in the second demobilisation, the marine spread did not return to site despite the defendant's threat of termination.

**[24]** The defendant terminated the contract by letter dated 9 September 2013 giving four days notice of the termination (pp 274–276 of CB Vol 1).

**[25]** There is no dispute that at the time when the contractual relationship came to an end that: A

(a) the anchors had been dropped but were not fastened to the seabed; and

(b) the tensioning process failed because the chains could not be hooked to the stevtensioner. B

This means that the buoy was far from being commissioned.

**[26]** The plaintiff disputes the termination and claimed that it was unlawful for the following reasons: C

(a) the plaintiff was not contractually bound to commission the buoy; and

(b) the hook up to the stevtensioner was impossible as the chains provided by the defendant were insufficient, too short to enable it to be hooked up. D

**[27]** Ardent commenced proceedings against the plaintiff on 2 January 2015 claiming a total of RM12,451,475 as an outstanding payment for the works done pursuant to the letter of appointment (pp 509–523 of exh P48). However, those proceedings had since been withdrawn with liberty to file afresh as Ardent was wound up prior to the commencement of the said suit without the sanction of the official receiver. E

F

**[28]** The plaintiff claimed that it suffered losses and damages as a result of the unlawful termination of the contract and instituted the present action against the defendant seeking for the following reliefs:

(a) payments made to Ardent and Ardent's subcontractors in the sum of RM15,498,499.91; G

(b) claims by Ardent in the sum of RM12,451,475 which is being disputed by the plaintiff in separate proceedings; and

(c) RM6.2m being the balance contract sum that remains unpaid by the defendant. H

As such the plaintiff is entitled to recover the following:

(a) losses and damages (which are payments made in the sum of RM15,498,499.91, the disputed sum of RM12,451,475 and the balance contract price of RM6.2m) in the total sum of RM34,149,974.91; I

(b) wasted costs and expenses incurred by reason of variations in the work scope, and the delays in the implementation of the works, the execution of which was under the complete control of the defendant and/or;

(c) alternatively, payment of sums due on quantum meruit basis;

(d) interest on the above sums at the rate of 5%pa from the date of this statement of claim till the date of full and final realisation; and

(e) costs.

**[29]** The defendant in defending the claim by the plaintiff asserts that the plaintiff was contractually bound to commission the buoy. When the plaintiff failed to commission the buoy, the plaintiff had committed a breach which resulted in the lawful termination notice to the plaintiff. The defendant contends that it suffered loss due to the plaintiff's breach as it had to employ a third party to complete the works. As a result the defendant in turn instituted a counter claim seeking for special and general damages and loss of income as a result of the breach of contract by the plaintiff, namely:

(a) a sum of RM10,103,571.70 as costs incurred by the defendant payable to the third party employed to complete the said works under the MTCE contract paid in Malaysian currency;

(b) loss of RM8,755,289.74 (USD2,021,540 exchange rate at RM4.331 as at 9 September 2015) costs incurred by the defendant and to be paid to the third parties for the completion of the said works under the MTCE contract in US dollars;

(c) loss of RM51,520.26 (SGD16,818 exchange rate at RM3,0634 as at 9 September 2015) costs incurred by the defendant to complete the said works under the MTCE contract paid in Singapore Dollar;

(d) loss of RM5,630,381.94 (USD1,300,018.92 exchange rate at RM4.331 as at 9 September 2015) costs incurred by the defendant to complete the said works under the MTCE contract paid in US Dollar;

(e) loss of income amounting to RM26,575,016 (USD6,136,000 exchange rate at RM4.331 as at 9 September 2015) that is the loss of income for USD52,000 per day starting from 1 June–26 September 2013;

(f) as a consequence of the said breach the defendant seeks for the return of the sum of RM6.2m paid by the defendant as the plaintiff had failed to perform the works under the MTCE contract in its entirety;

(g) general damages for the breach of the contract to be assessed by the court;

(h) interest of 5%pa on general damages from the date of judgment to the date of realisation; and

(i) costs.

**[30]** Parties agreed that the trial was to be bifurcated, the issue of liability is to be determined first and damages to be assessed later.

ISSUES TO BE DETERMINED

**[31]** The issues to be determined are:

(a) whether the plaintiff was contractually bound to commission the buoy; and

(b) in the event the answer to para (a) above is in the affirmative, was the plaintiff in breach of its contractual obligations.

C. FINDINGS OF THE LEARNED HIGH COURT JUDGE

*C.1. Obligation to commission the buoy*

**[32]** It is an agreed fact that the buoy was never commissioned. Counsel for the defendant submits that the LOA is clear, in that it imposes an obligation on the plaintiff to commission the buoy. Whereas learned counsel for the plaintiff submits otherwise.

**[33]** It is the findings of the learned High Court judge that the plaintiff was obliged to commission the buoy (paras 29–35 of the grounds) premised on the following:

(a) cl 1 of the MTCE contract which provides:

> Pending execution of formal Contract between the Principal Contractor and Sub Contractor, the following documents shall constitute an integral part of the contract hereby awarded:
>
> (i) Principle Agreement-MTCE and PCSB
>
> (ii) Terms and Conditions Agreement-MTCE and MSA
>
> In the event of any conflict or discrepancy between the aforesaid documents, the Principal Contractor shall advise and use its sole/absolute discretion to determine which documents shall prevail.

(b) cl 5 of the MTCE contract (p 11 CB1) which provides:

> The details of the works to be performed and undertaken by sub contractor *shall include but not limited as per Appendix II*, MSA Ref No: MSA/2013/EWT/MTCE/02, Scope of Work schedule and subsequently, any other agreed scope of work and specifications discussed between both parties ...

**[34]** The learned High Court judge concluded, premised on cl 1 of the MTCE contract, that both the plaintiff and the defendant had intended for a formal contract to be executed after the MTCE contract. However that has not been carried out. Thus, in the absence of a formal contract, the learned High Court judge found that the MTCE contract is the only binding contract between the parties.

Hence cl 1 of the MTCE contract provides that the Petronas contract shall be an integral part of the contract between the plaintiff and the defendant. It is an undisputed fact that the Petronas contract required the buoy to be commissioned.

**[35]** It was also agreed by the plaintiff that in the event of any conflict or discrepancies that should arise in respect of the contractual terms, the defendant shall have the absolute right to determine which term (document) should prevail. It is thus within the defendant's legal rights to make an election that the Petronas agreement should prevail, which is what the defendant is now doing in resisting the plaintiff's claim.

**[36]** Therefore premised on the aforesaid two clauses the learned High Court judge made findings that the MTCE contract required the plaintiff to commission the buoy (para 31 of the grounds).

**[37]** The learned High Court judge also said that her findings were further fortified by:

(a) the terms of payment provided in the MTCE contract. The payment schedule in Appendix 1 of the MTCE contract provided that the defendant shall pay the plaintiff RM12.4m for the contracted works. The contracted works has been particularised as the transportation and installation and hook up and commission of the EWT facilities (from 'T&I/HUC'); and

(b) the conditions attached to the payment of the contract sum. The defendant was to make two payments of equal amount. The first payment of 50% became due when the marine warranty surveyor issued the suitability report. The plaintiff admits receipt of this. The second payment of 50% became due only when the marine warranty surveyor certifies that the EWT facilities has been hooked up and commissioned.

**[38]** Therefore premised on the aforesaid, the learned High Court judge was of the view that the plaintiff was contractually bound to commission the buoy.

*Whether the plaintiff committed breach of contract*

**[39]** It was the findings of the learned High Court judge that the plaintiff had committed breach of contract by the following acts:

(a) the plaintiff's failure to commission the buoy; and

(b) failure of the plaintiff to hook the chain to the stevtensioner.

**[40]** In determining whether the plaintiff committed a breach of the contract the trial court proceeded to determine the following sub-issues:

(a) whether the hook up of the chains to the stevtensioner failed because there were insufficient chains; and

(b) whether Captain Hamzah is the defendant's agent. It is crucial to determine this issue because Captain Hamzah committed the error of dropping the anchors off the designated position, which had caused the failure to hook up the chain to the buoy, which was the reason why the buoy was not commissioned.

**[41]** The learned High Court judge found that, although the plaintiff argued that the failure to hook the chain to the stevtensioner was due to:

(a) the defendant's failure in providing the plaintiff with adequate length of chain; and

(b) the plaintiff's marine expert, Mr Bruce Gordon Ewen ('PW2') prepared a report which supported the plaintiff's allegation that said the hook up failed because the quantity of the chains was insufficient.

However, during cross-examination, PW2 admitted that:

(a) his calculation had not taken into account that there was another 20 meter of chain available for the plaintiff to do the hook up;

(b) with the available quantity of the chains, the hook up was possible; and

(c) as the anchor had not been dug in, the hook up to the stevtensioner could have been made possible by simply removing the anchor.

**[42]** The defendant contended that another failure to hook up was due to the vessel supplied and used by the plaintiff was underpowered and not powerful enough to pull the chains to hook up the chains to the stevtensioner. However, the learned High Court judge found that the Independent Marine & Engineering Consultants Sdn Bhd ('IMEC'), a marine warranty surveyor appointed by Ardent, plaintiff's subcontractor stated that:

A Setia Jaguh itself cannot do the tensioning since the BP is only 100 MT with 150MT is indeed for tensioning test, Meeting on plan to demob all marine spreads held on board Setia Jaguh as per discussed. Setia Jaguh and Tat Hong to be replaced by another vessel.

B **[43]** Based on the aforesaid, the learned High Court judge found that the plaintiff has no evidence to substantiate its allegation that the hook up failed because there was insufficient chain and the defendant's contention that the vessel was underpowered was proved by the report by IMEC.

C *Whether the offshore construction manager ('OCM'), Captain Hamzah was the defendant's agent*

**[44]** It was the plaintiff's argument that Captain Hamzah was the
D defendant's agent based on documentary and oral evidence. In the documentary evidence of daily progress report (P15), appeared Captain Hamzah's signature on it with a stamp of MTC Subsea Sdn Bhd (MTCS), which described him as MTCS's representative in these reports. MTCS is the defendant's subsidiary company. It is the plaintiff's submission that Captain
E Hamzah is the defendant's agent as MTCS is the defendant's subsidiary company.

**[45]** However the learned High Court judge was not persuaded by the argument of the plaintiff as that would run foul of the doctrine of separate legal
F entities as enunciated in *Salomon v Salomon & Co, Ltd; Salomon & Co, Ltd v Salomon* [1897] AC 22. Therefore, the learned High Court judge held that the plaintiff failed to show by way of its documentary evidence that Captain Hamzah was the defendant's agent.

G **[46]** The plaintiff also adduced oral evidence on this point by calling Encik Ahmad Daniya bin Yusof ('PW3') as a witness. He is one of the directors of Ardent. PW3 denies that Captain Hamzah was an Ardent's representative. He alleges that Captain Hamzah was a representative of MTCS and nobody from
H Ardent was in charge offshore.

**[47]** PW2 stated that even though Captain Hamzah is Ardent's director, Captain Hamzah does not have the power to appoint himself as the OCM.

I **[48]** The learned High Court judge referred to a search of the Companies Commission of Malaysia (D35), where the defendant established that Captain Hamzah is one of Ardent's director. It was also found that PW3 was a bankrupt and therefore Captain Hamzah must be taken to be the sole director as PW3 failed to show that he had obtain leave from the court to act as Ardent's director.

**[49]** At this point, the plaintiff failed to call any MTCS's representative to confirm or deny Captain Hamzah's position.

**[50]** This allegation by the plaintiff that Captain Hamzah is a representative of the defendant's is premised on the daily progress report which was prepared by a third party, IMEC. It was open to the plaintiff to call a MTCS's representative. That would be the best evidence available. However, the plaintiff failed to do so and offered no explanation for this omission.

**[51]** The learned High Court judge also found that the credibility of PW3 who testified that Captain Hamzah was MTCS's representative is in doubt. Although he has been a bankrupt since 2012, he held himself as Ardent's director when he signed the letter of 18 April 2014. The learned High Court judge also found it difficult to believe PW3 as being unable to locate Captain Hamzah to give evidence in court. Why should Ardent appoint the second OCM to replace Captain Hamzah if Captain Hamzah was MTCS's representative? Why did MTCS not appoint a replacement from its own representative? The learned High Court judge also took into account that the plaintiff had always maintained that it was responsible for the provision of manpower in this project. Nowhere is there any statement that in the plaintiff's provision of manpower, the appointment of the OCM is to be excluded.

**[52]** Therefore, on a balance of probabilities, the learned High Court judge found that Captain Hamzah was the plaintiff's agent as he can also be regarded as sole director of Ardent as PW3 is a bankrupt.

*Whether the defendant's agent had dropped the anchor at the wrong positions*

**[53]** The anchor had been dropped on 21.6 meter out of position and further was 64.3 meter out of position by Encik Khairul Anuar's (second OCM) instruction who has taken over the job from Captain Hamzah (first OCM).

**[54]** As the OCM now proved to be the plaintiff's agent, the error of dropping the anchor off the designated position, was the act of the plaintiff, which was in breach of its contractual duty.

**[55]** It was also proved during cross-examination of PW2 that the OCM being the plaintiff's agent could have easily rectified the situation by just moving the anchor but the plaintiff did not.

**[56]** As the plaintiff is the party that committed the breach, it cannot be allowed to succeed in its alternative plea of quantum merit (*Lau Kee Ko & Anor v Paw Ngi Siu* [1974] 1 MLJ 21).

**[57]** Based on the aforesaid, the learned High Court judge dismissed the plaintiff's claim with costs of RM60,000.

**[58]** The defendant's counterclaim is allowed with damages to be assessed as follows:

(a) special damages of RM24,540,763 as at 10 July 2014;

(b) loss of income amounting to RM26,575,016 as at 26 September 2013;

(c) general damages for the breach of contract to be assessed by the court;

(d) interest of 5%pa on (a) and (b) above from 11 July 2014 and 27 September 2013 respectively to the date of full settlement;

(e) interest of 5%pa on (c) above from the date of judgment to the date of full settlement;

(f) costs; and

(g) other relief and/or order that the court thinks fit and proper.

OUR DECISION

**[59]** Our judgment will address the issues in relation to the points raised in the memorandum of appeal of the plaintiff.

*Whether the defendant could elect to have the plaintiff bound by the Petronas contract (paras 3, 4, 5 and 6 of the memorandum rayuan tambahan)*

The construction of the LOA

**[60]** Paragraphs 3, 4, 5 and 6 of the *memorandum rayuan tambahan* relates to the construction of the MTCE contract. The plaintiff submitted that the learned High Court judge erred when making her findings that the defendant could after entering into a contract with the plaintiff for a far lesser price and scope of work, elect to have the plaintiff bound by the defendant's contractual obligations under the Petronas contract for a larger sum.

**[61]** It was the findings of the learned High Court judge that the plaintiff was obliged to commission the buoy on the basis of cll 1 and 5 of the MTCE contract.

**[62]** The MTCE contract envisaged the plaintiff and the defendant entering into a 'Terms and Conditions Agreement' which they never did (cll 1(ii) and 2 of the MTCE contract at p 10 of the CB1). Neither was the plaintiff provided with the Petronas contract between defendant and Petronas.

**[63]** Clause 1 of the MTCE contract which was relied upon by the learned High Court judge applies in the event of conflict between the principle agreement, which is the Petronas contract and the 'Terms and Conditions Agreement'. There never was any 'Terms and Conditions Agreement' entered into between the plaintiff and the defendant. Clearly, cl 1 is therefore inapplicable.

**[64]** Further, the provision of cl 1 of the MTCE contract does not give an election to the defendant to elect which scope of work it wanted the plaintiff to perform, after entering into the contract with the plaintiff at an agreed price, which is much less than the Petronas contract. A reading of cl 1 of the MTCE contract suggests that it was intended to determine which document would prevail in the event of conflict of inconsistency between the two. Since there was no 'Terms and Conditions Agreement' entered into between the plaintiff and the defendant, there is no conflict/inconsistency between the MTCE contract and the Petronas contract. The MTCE contract is a product of the subcontract of part of the works of the Petronas contract to the plaintiff.

**[65]** Appendix 2 of the MTCE contract (p 17 of CB1) sets out the specific scope of works which is the provision of transportation and installation (T&I) of EWT facilities system for Kayu Manis and Anjung Kecil Development Field. This specific scope of works involved the provision of the following:

(a) T&I PMT;

(b) marine spread fastening;

(c) seafastening and grillage;

(d) inspection and testing;

(e) lifting and testing;

(f) lifting and rigging aids; and

(g) fuel and bunkering and bedding all inclusive.

**[66]** The evidence of SP1 and SP2, explained the meaning of what constitutes 'the provision of T&I PMT'. The evidence of SP3, who is an Ardent's director who confirmed the evidence of SP1 and SP2, that 'T&I PMT' involved only the provision of manpower and vessels for marine spread chartering (provision of vessels), seafastening and grillage (loading of cargo), inspection and testing (ensuring cargo was on board), lifting and rigging aids (part of the assembly and lifting equipment during loading), and fuel, bunkering, bedding (provision of fuel and accommodation) (refer to notes of evidence pp 544–545 *RR* (b) *Jld* 3/4).

**[67]** The defendant's witness, SD1 also confirmed that a portion of the Petronas contract and not the entire Petronas contract was subcontracted to the plaintiff (notes of evidence at p 670 *RR* (B) *Jld* 3/4).

**[68]** The learned High Court judge did not give any consideration to these witnesses' testimony in interpreting the MTCE contract.

**[69]** There is no other documentary evidence to suggest parties agreed to any other scope of work other than what was set out in the MTCE contract. Apart from the plaintiff not given a copy of the Petronas contract, neither was the plaintiff informed that the scope of works of the Petronas contract was to be performed by the plaintiff.

**[70]** From the Petronas contract, it appears that it had a far larger scope of work than what the plaintiff had to perform, namely 'to do all works towards supply, delivery, installation, commissioning, operation and maintenance of EWT Vessel and EWT System for KSME and AK project for Petronas'. Whereas the MTCE Contract only required the plaintiff to supply 'T&I PMT', namely the supply of transportation and installation, project management team and vessels, consisting only a portion of the works under Petronas contract. This the learned High Court judge failed to appreciate.

**[71]** Counsel for the defendant submitted that cl 5 of the MTCE contract is unambiguous and there is no other alternative construction can be attached to its meaning. Counsel for the defendant referred to the case of *Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors* [2008] 2 MLJ 256 in that when interpreting a contract they should be construed in their plain and ordinary meaning, except to the extent that some modification is necessary to avoid absurdity, inconsistency or repugnancy. It was also argued by the defendant that even assuming for a moment that cl 5 is capable of being given an alternative construction/interpretation, the background factual matrix has to be taken into account. This was the position taken in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 and *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464.

**[72]** However, we are of the view that, the cases cited by the defendant are of no help to the defendant. In fact, after taking into account the background facts of the present case, it is illogical to hold that the contract between the plaintiff and the defendant encompass the whole works as envisaged in the contract between Petronas and the defendant. The learned High Court judge overlooked the fact that the Petronas contract has a consideration in excess of RM50m and a term in excess of four years. Whereas, the MTCE contract

between the plaintiff and the defendant has a consideration of RM12.4m and the time line was only for 26 days (p 16 CB1 and pp 256–257 of CB1).

The obligation to commission the buoy

**[73]** The learned High Court judge found that the plaintiff was contractually bound to commission the buoy.

**[74]** The defendant took the stand that the plaintiff was required to commission the EWT facilities, which in essence, according to the defendant, to do everything that the defendant is bound to do under the Petronas contract (see notes of evidence dated 12 August 2016 p 709 Appendix E).

**[75]** However, this stand is contrary to the documentary evidence, as nowhere in the MTCE contract was commissioning provided for, save for Appendix 1 where the terms of the payment are upon completion of 'T&I/HUC' (p 16 of CB1). Apart from this, the word 'commissioning' appears in the description of the project in the MTCE contract (p 9 of the CB1). However, it is to be noted that 'the project' refers to the project as envisaged in the Petronas contract (pp 1–8 of CB1) not the MTCE contract.

**[76]** There was also the testimony of SP3 who said that parties do not intend for the plaintiff to commission the EWT facilities system (refer to notes of evidence pp 567–570 *RR* (B) *Jld* 3/4, Appendix F). SP1 disagreed that the plaintiff has the obligation to perform the transportation and installation of the EWT vessel and system and commission that the system is in working order before handing over to the defendant's company.

**[77]** In addition, the evidence shows that the defendant was in control of the project. This is apparent from the following:

(a) the defendant's representatives were situated offshore;

(b) the OCM was the defendant's representative (described as MTC's representative) until 12 July 2013 when he resigned (this issue will be addressed in the later part of this judgment);

(c) the project manager is SD1 who is the defendant's representative; and

(d) the IMEC reports dated 10 June 2013 (pp 958–973) and dated 20 August 2013 (pp 1100–1127 CB3) show the personnel on KMSE site were that of the defendant's representatives, namely:

(i) Mr Asral Fikri, representative — MTC Engineering Sdn Bhd;

(ii) Captain Hamzah Mohammad, Construction Supt — MTC Subsea Sdn Bhd;

(iii) Mr Harris Shariff, Field Engineer — MTC Subsea Sdn Bhd; and

(iv) Mr Tawfik Ahmad Fadzil — MTC Subsea Sdn Bhd.

**[78]** The OCM was in charge of the following:

(a) coordinates offshore construction works;

(b) coordination of personnel and equipment to ensure continuous program of works during offshore installations;

(c) ensure safety of all personnel on board vessel throughout the offshore installation campaign; and

(d) monitor drilling performance review ('DPR') and ensure prompt action to any matters highlighted by DPR or site personnel.

**[79]** The project manager was in charge of the following (at p 39 CB1):

> Responsible for the overall execution of CONTRACTOR'S operation under the CONTRACT including matters on the safety, Project management, Operation, Engineering, Contract, QA/OC and others.
>
> PM shall liaise with COMPANY on all matters pertaining to WORK. PM shall ensure quality and timely delivery of the project within the budget in compliance to CONTRACT in the most effective and safest manner.

**[80]** Counsel for the defendant referred us to the case of *Heritage Grand Vacation Club Bhd v Pacific Fantasy Vacation Sdn Bhd* [2016] 4 MLJ 389 and *Shalini a/p Kanagaratnam v Pusat Perubatan Universiti Malaya (formerly known as University Hospital) & Anor* [2016] 3 MLJ 742. We failed to see how these two cases support the defendant's case, namely, it is the plaintiff's obligation to commission the buoy.

The installation procedure

**[81]** The installation procedure was provided to the plaintiff by the defendant to identify the vessels which the plaintiff was to provide (pp 53–56 of CB1).

**[82]** It is undisputed that, in fulfilling the Petronas contract, the defendant had engaged other subcontractors to carry out the other scope of works under the Petronas contract. The plaintiff's scope of work constitutes only one of the scope of works under the Petronas contract. Hence the installation procedure was also provided to the other subcontractors to identify what was required of them in respect of the installation procedure and other areas of works. The installation procedure was designed and issued by MTCS, which was then issued to the defendant for circulation (p 27 CB1). SD1, the defendant's

project manager during cross-examination confirmed this after he was referred to the appendices of the installation procedure on what these works comprised (refer to notes of evidence pp 683–687 *RR* (B) *Jld* 3/4 Appendix I).

**[83]** Therefore, contrary to the findings of the learned High Court judge that the defendant could after entering into a contract with the plaintiff for a far lesser price and scope of work, elected to have the plaintiff bound by the defendant's contractual obligations under a contract for a larger sum, namely the Petronas contract, is clearly erroneous. The plaintiff had a defined scope of work and it was never to carry out the scope of work of the Petronas contract. From the construction of the MTCE contract, it has to be taken in its literal meaning given the factual matrix of the present case that the plaintiff is only limited to the provision of the vessels and manpower for the EWT system.

*Whether the plaintiff was in breach*

Whether plaintiff failed to hook up and commission the EWT facilities system (paras 8–16 of the *memorandum rayuan tambahan*)

**[84]** It is not in dispute that the hook up could not be done.

**[85]** The defendant contended that this was because of the incapacity of the vessels provided by the plaintiff, while the plaintiff alleged that it was due to an insufficient supply of the chain length provided by the defendant.

**[86]** The learned High Court judge found that the plaintiff was in breach of its obligations to hook up and commission the EWT facilities system. It is also the finding of the learned High Court judge that there was sufficient chain length provided by the defendant for the hook up.

**[87]** According to the installation procedure, which was provided by the defendant to the plaintiff, the required chain length for the anchor chains was 650 meter (p 50 of the CB1). Apart from the recommended 650 meter of chain, Vryhof Anchors, the stevtensioner providers in the installation procedure also says that an additional 124 meter of chain is required (p 151 of CB1), given that 20 meter clump weight has already been included in the configuration. As such, the minimum requirement chain length as prescribed by the installation procedure, after taking into consideration of the 20 meter clump weight, would be:

650m (Chain) + 124m (additional chain length)

**[88]** The IMEC report dated 10 June 2013 (p 961 of CB3) showed that only 600 meter of chain was loaded out. Clearly the chain length loaded out was insufficient.

**[89]** The learned High Court judge accepted the evidence of SP2 when he was cross-examined by counsel of the defendant, when SP2 said that with 20 meter of clump weight chain, the chain would be sufficient to perform the hook up (para 49 of the grounds at p 862 CB3). The learned High Court judge said that SP2 conceded that the tensioning works is 'mathematically possible' if the 20 meter clump weight has been taken into account (para 50 of the grounds).

**[90]** However, we found that these findings of the learned High Court judge was erroneous. The 20 meter clump weight was already taken into account in the installation procedure which is the required chain length of 650 meter + 124 meter. There were actually no concessions made by SP2. SP2 was merely responding to the suggestions that if a chain length of 116m referred to Ahmad Daniya's email of 27 August 2013 (pp 374–377 CB3) was produced on site (and it was short of the 8 meter as required for the 124 meter length) would the 20 meter clump weight make the hook up possible. SP2 answered and explained that the hook up was 'mathematically possible' under perfect conditions (p 530 *RR Jld* 3/4). However the seabed cannot be termed as 'perfect conditions' for the hook up to be done. The learned High Court judge failed to appreciate and considered SP2's evidence when he said that:

> I mean if you were just looking at a drawing on paper, you could do it mathematically. You could probably do it. But it wasn't like that. It was at sea with the ship moving up and down, with your lengths not exactly in a straight line, your chains not exactly in a straight line. Nothing is perfect. So it is not practically possible. It might be mathematically possible. But it's not practically possible.

**[91]** The defendant took the position that an additional 100 meter chain length was provided when it relied on its email dated 24 August 2013 (p 371 of CB1) which states as follows:

> The actual chain length and we have additional approx. 100m work chain which was connected to the anchor chain for tensioning making it more than 700 m length.

100 meter is still short than what is required in the installation procedure which is 124 meter. In any event, the additional 100 meter chain length allegedly available was never established in evidence that it had been provided and loaded onto the vessels. The contemporaneous documentary evidence, namely the IMEC report dated 10 June 2013 documented the load out list identifying the equipment loaded out, which showed only 600 meter of chain

length was loaded out. This contradicted the contention of the defendant that they had provided another 100 meter of chain length as suggested in the email. But, no matter how one looks at it, 100 meter is still short than the required length of 124 meter.

20 meter clump weight

**[92]** At para 49 of the grounds, the learned High Court judge referred to the testimony by SP2 when he failed to take into account that there was another 20 meter clump weight on each anchor to perform the hook up. The learned High Court judge relied on the so called 'concessions' by SP2 that the tensioning works is 'mathematically possible' if the 20 meter clump weight has been taken into account. By accepting the evidence of SP2 which is 'mathematically possible', the learned High Court judge is ignoring the requirements of the chain length as stated in the installation procedure. Essentially, the learned High Court judge found that although the chain length was shorter than the required length as stipulated by the installation procedure, it was sufficient to perform the hook up. These findings are clearly flawed because:

(a) it is contradictory to the requirements as stated in the installation procedure, which is 650 meter + 124 meter (after taking into account the 20 meter clump weight which is attached to each anchor); and

(b) SP2 never conceded to the sufficiency of the chain provided by the defendant. He was asked that if the additional length of 124 meter was short of 8 meter, and the 20 meter clump weight was added on, would that make the chain length longer and made it possible to perform the hook up to which he said it's mathematically possible in perfect conditions but it's not practically possible (refer to para 90 of this judgment).

Essentially what SP2 meant is that with the length of the chain provided by the defendant, the hook up cannot be done, as there was not enough chain and that the procedure was not followed. As the additional chain as required was not provided, the plaintiff could not perform the work as required and no tensioning could be done.

**[93]** The learned High Court judge's finding that there was sufficient chain length to perform the hook up was not supported by any technical nor expert evidence. SP2 was the only expert witness produced. The evidence of SP2 and the IMEC report showed that due to the insufficient chain length provided by the defendant the hook up was impossible to perform. Therefore, the findings by the learned High Court judge that the plaintiff had breached the contract when it failed to hook up was not supported by evidence and clearly erroneous.

A The anchor drop position (para 17 *memorandum rayuan tambahan*)

**[94]** It is undisputed that the six drag anchors were dropped out of its designated positions.

B

**[95]** Appendix F of the installation procedure provides the designated location for the anchors to be dropped off (p 150 CB1). The IMEC report dated 20 August 2013 recorded the six anchors were indeed dropped not at the target position.

C

**[96]** The learned High Court judge accepted this fact. However, she found that the error could be remedied by moving the anchors into the correct position, which the plaintiff failed to do (para 61 of the grounds). Her basis was based on the evidence of SP2 where she had reproduced at para 50 in her D grounds, that it was possible to move the anchors.

**[97]** However, a perusal of the evidence of SP2 which was reproduced by the learned High Court judge at para 50 of her grounds does not seem to suggest that SP2 said conclusively that the anchors could be moved given the E insufficiency of the length of the chain provided by the defendant. In fact when it was suggested to SP2 that it was possible to move the anchors to the designated position, SP2 did ask the counsel for the defendant 'using what'. Essentially the evidence points to the fact that due to the shortage of the chains it was not possible to move the anchors to the desired position. Hence the F findings of the learned High Court judge that it was possible to move the anchor to the designated position, is without any expert evidence nor consideration. This is a situation of where six anchors dropped onto the seabed in the middle of the ocean and the existence of a marine spread with specific functions none of which were to pull up the anchors (as opposed to dropping G them down) and re-drop them in a different location. This was precisely what SP2 meant when he was asked whether it was possible to move the anchors and he replied 'using what', as the marine spread was not to function as such. SP2 questioned back counsel when he was asked as to the possibility of lifting the anchors and re-drop back to the ocean bed, as what vessel or equipment to be H used to lift the anchors and re-drop them back into position. Given the installation procedure did not stipulate the option to re-lift from the seabed and re-drop the anchors back to the sea bed; for the court to accept that the anchors could have been moved in deep sea conditions (without addressing as to what vessels and equipment were to be introduced to the site to perform this I task and who was to bear the costs of the same) was misconceived.

**[98]** SP2 also said in his testimony that even if it was possible to move the anchors, it would not have changed anything (p 621 *RR* (B) *Jld* 3/4) because that is where they were supposed to be dropped off in the first place and to do

that a chain length of 124 meter is still required, which in this case there was no required length provided by the defendant.

Capability and capacity of vessels (paras 15, 16 and 18 of the *memorandum rayuan tambahan*)

**[99]** Apart from finding that the plaintiff has failed to establish that the hook up of the chains to the stevtensioner failed due to insufficient chains, the learned High Court judge also found that the probable cause of the hook up failure was, as contended by the defendant, due to the fact that the vessel was underpowered (para 54 of the grounds).

**[100]** It is undisputed that the plaintiff's obligation is to provide vessels (termed as marine spreads) used for the project. These vessels or marine spread is stipulated in the installation procedure. When the hook up could not be performed, the defendant requested the plaintiff to change the marine spread in its email dated 13 August 2013 (pp 405–406 of CB1). The email states:

> it is found that the existing marine spread is not capable to performed (sic) the job due to safety and vessel limitation itself ... Our proposal is to use AHT with bigger capacity of bollard pull for the tensioning works and installation of chain to buoy using air tugger.

The defendant raised issue with the vessels provided by the plaintiff, namely the crane barge Tat Hong 819 and the anchor handling tug ('AHT') Setia Jaguh (p 379 of CB1).

It is not in dispute that the crane barge Tat Hong 819 was specified in the installation procedure (p 53 CB1). But at trial the instability of Tat Hong 819 was abandoned by the defendant. What remains to be an issue is the AHT Setia Jaguh.

**[101]** What appears to be not an issue is the fact that AHT Setia Jaguh was identified in the installation procedure as MMS Pahlawan 2 with a bollard pull of 60 tonnes. The plaintiff chartered Setia Jaguh, an alternative vessel after the demobilisation of MMS Pahlawan 2 as it has been chartered to another project by then. It is also not in dispute that Setia Jaguh's bollard pull was 105 tonnes which in fact was more than the bollard pull of MMS Pahlawan 2. SP2 in his evidence said that:

> The AHT, 'SETIA JAGUH' was chartered in as replacement for 'MMS PAHLAWAN 2'. 'SETIA JAGUH' is bigger, more powerful and has a higher bollard pull ...
>
> ... The replacement of AHT was more powerful. It should be remembered that MTCE/MTCS considered the less powerful MMSP2 adequate for the task in hand

A and the MTCS Installation procedure had been verified and approved on that basis. Even 'LANPAN 21' had been considered acceptable.

**[102]** The learned High Court judge erroneously concluded that Setia Jaguh was underpowered premised upon the contents of the IMEC report which is the marine warranty surveyor appointed by Ardent, the plaintiff's subcontractor which states in its surveyor log (P6) as follows:

> Setia Jaguh itself cannot do the tensioning since the BP is only 100MT while 150MT is needed for the tensioning test.

**[103]** The learned High Court judge misconstrued the above said contents of the IMEC reports. Nowhere does the report says that Setia Jaguh was underpowered. It is a fact that Setia Jaguh cannot do tensioning as it was never intended to do so, as Setia Jaguh was an anchor handling tug which was never meant for tensioning or pulling the chain to the crane. The installation procedure sets out the task of the AHT and its function is to pick up the anchor wire and have it connected to the crane barge (refer to anchor deployment procedure at p 60 CB1). This was supported by the report of SP2 which the learned High Court judge failed to consider which sets out the intended use of the vessels, namely sections 4.2, 13.2 and 13 of the expert report, with particular reference to section 13.2.3 on the function of Setia Jaguh (p 508 of CB1) which states:

> 13.2.3 ... The reason that a lower bollard pull tug could be utilized is because the plan required cross-tensioning to be completed using a Stevtensioner prepared on the deck of TH819 and not by the AHT itself. In this section, I will show that Setia Jaguh was in fact used in a manner that had not been planned for although ultimately, that also failed.

The report of SP2 further said that:

> 13.4.8 ... They also note that, 'Setia Jaguh itself cannot do the tensioning since the BP (Bollard Pull) is only 100MT while 150MT is needed for the tensioning test'. However, *the installation procedure in 14.4 of the IPCB directs that the tug is only used for bringing the anchor chain pennant or buoy wires to TH 819* and that the crane on the latter is used for yo-yo-ing the tensioner. *It was never intended that the tug be used for tensioning*.

**[104]** From the evidence, the pre tensioning works are supposed to be done by the crane barge by way of cross tensioning. This is evident by the testimony of SP2 who said that:

> ... according to procedure, the *(sic), it was never intended for either of the anchor handling tugs to actually tension the cables, tension the anchor chains*, that was clearly stated as being the Stevtensioning technique which would be done by the crane involving a tug trying to tension a chain was outside the procedure. (p 406 *RR* (B)

*Jld* 2/4).)

Further at p 431 *RR* (B) *Jld* 2/4), SP2 said:

> Q: ... I would like to ask you, the defendant asked the plaintiff to provide other options for a marine spread. And they suggested the Plaintiff should use a anchor handling tug with a bigger capacity of Bollard pull and installation of a chain using an air tugger. Can you tell the Court what your comment is about that in relation to the installation Procedure?
>
> A: ... *as soon as you start talking about using a tug to tension a chain, you are already departing from Installation Procedure*. And there is no contingency in the Installation Procedure to do that. So we would have to sit down and decide what was in new Installation Procedure and draw out such a procedure or an amendment to the procedure. The air tugger idea, I believe it's we put a new winch on top of the convoy and that heaves the chain so that we can connect it to the convoy. But you have already, as soon you use a tug to tension the chain, *you are already departing from that procedure*.

**[105]** Therefore, from the aforesaid, the learned High Court judge erred when she held that the hook up could not be done due to the vessels provided by the plaintiff being underpowered. The plaintiff had chartered the requested vessels as stipulated under the installation procedure. Therefore any incapacity or under power of the vessels was due to the defendant's in stipulating the requirements of the vessels in the installation procedure.

**[106]** The learned High Court judge also erred when she relied on the single entry in the IMEC report dated 20 March 2013 (p 1126 CB3) to hold that the anchor handling tug (AHT) Setia Jaguh was under capacity. The entry 'Setia Jaguh itself cannot do the tensioning since the BP is only 100MT while 150MT is needed for tensioning test', does not establish that Setia Jaguh was under capacity, because:

(a) it was never Setia Jaguh's function to do tensioning. Setia Jaguh was an AHT and was never intended to do tensioning, as can be seen from the installation procedure issued by the defendant; and

(b) in fact Setia Jaguh has a higher capacity than the AHT specified in the installation procedure at p 56 of CB1, which is MMS Pahlawan 2 (which has a Bollard Pull of 60 tonnes). Setia Jaguh has a Bollard Pull of 105 tonnes.

**[107]** It is to be noted that there is no other expert report other than SP2's, hence the testimony of SP2 that Setia Jaguh was never underpowered/under capacity and it was never intended to be used for tensioning. Using Setia Jaguh

to tug to tension a chain, is already departing from installation procedure. In the absence of other experts, the evidence of SP2 was unchallenged.

Whether Captain Hamzah was the plaintiff's agent

**[108]** The learned High Court judge held that Captain Hamzah was the plaintiff's agent.

**[109]** Captain Hamzah was the OCM for the project until 12 July 2013 when he demobilised the marine spread from KMSE and thereafter resigned (p 270 of CB1).

**[110]** We found that there has been no evidence from the documents to suggest that Captain Hamzah is the plaintiff's representative. In fact he is a MTCS's representative as evidenced from the clear contemporaneous documents. The relevant documents for the project were the IMEC Report dated 10 June 2013 and dated 20 August 2013 which shows the following focal personnel were at site throughout the job execution at site:

(a) 20 May 2013–1 June 2013/2 June 2013–15 July 2013 (pp 9760 and 1102 CB3):

(i) Mr Asral Fikri, representative — MTC Engineering Sdn Bhd;

(ii) Captain Hamzah Mohammad, Construction Supt — MTC Subsea Sdn Bhd;

(iii) Mr Harris Shariff, Field Engineer — MTC Subsea Sdn Bhd; and

(iv) Mr Tawfik Ahmad Fadzil — MTC Subsea Sdn Bhd;

(b) 23 July 2013–16 August 2013 (p 1102 CB3):

(i) Ir Amin Syakir Latib, Representative — MTC Engineering Sdn Bhd;

(ii) Mr Khairul Anwar Ibrahim, Operation Manager — Ardent Sea-Tramp Sdn Bhd;

(iii) Mr Mohd Anuwar Hamzah, SAAEM HUC Engineer — AAEM/Ardent Sea-Tramp Sdn Bhd; and

(iv) Mr JP Heeren, Stevetensioner Engineer — Mooreast/MTC Engineering Sdn Bhd.

**[111]** Further the MTCE daily progress report were signed off by an 'Offshore Construction Manager NAME: Capt Hamzah Mohamad', followed by the stamp of MTCS next to his name.

**[112]** The learned High Court judge at paras 56 and 57 of her grounds said that although Captain Hamzah signed off the daily progress reports with the stamp of MTCS and described as MTCS's representative in the reports, they do not show that he is therefore MTCE's representative because of the doctrine of separate legal entities.

**[113]** The learned High Court judge's basis for holding that Captain Hamzah was the plaintiff's representative was because of an email dated 1 February 2013 (p 313 of CB1) using an email address of 'capt.hamzah@seatramp.my' and the fact that Captain Hamzah was a director of Ardent. However, to rely on these to form a basis to support the learned High Court judge's findings that Captain Hamzah was the plaintiff's representative in his capacity as OCM for the project, is indeed erroneous. There are more substantive, relevant and authoritative documents like the IMEC reports and the daily progress reports which were prepared on site which sets out the capacities of parties involved in the project recorded in a contemporaneous manner. The IMEC reports at p 960, 1102 CB3 that IMEC acts for MTCS.

**[114]** In fact the email address of Captain Hamzah which was relied upon by the learned High Court judge as a basis to conclude that he was a representative of the plaintiff, was before the commencement of the MTCE contract, which hardly can be termed as contemporaneous. It is also in evidence that Captain Hamzah had used various email address, eg in an email dated 22 January 2013 at p 312 of CB1) he uses hamzah@corromasters.com. SP3 explained that he has assigned that email address to Captain Hamzah to use as they had worked together on other matters eg loading masses on cargo.

**[115]** The fact that Captain Hamzah was appointed as director of Ardent does not make him an Ardent representative as OCM. A person may be a director of various companies without being employed in any of them. This does not conclusively proved that he was a representative of the plaintiff.

**[116]** As to the credibility of PW3 which the learned High Court judge found to be in doubt due to the fact that he was a bankrupt and that he had not obtained leave from the court to act as Ardent's director; we found that the learned judge erred in using this as a basis in deciding the reliability and credibility of the evidence of PW3. When considering the credibility of witnesses (regardless of whether they are a bankrupt), it is trite to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, namely the IMEC reports and the daily progress reports. Even without the evidence of PW3, the IMEC reports and the daily progress reports are sufficient to support the plaintiff's case that Captain Hamzah is indeed the defendant's representative.

A TERMINATION

**[117]** Given the aforesaid, the judge was plainly wrong in coming to the conclusion that the plaintiff was in breach of the LOA.

B

**[118]** The defendant terminated the contract due to the plaintiff's alleged failure to change the marine spread and delay on the part of the plaintiff to complete the works.

C **[119]** On the alleged failure on the part of the plaintiff to change the marine spread, we have addressed this issue in paras 99–107 in this judgment. The termination letter of the defendant also mentioned delay on the part of the plaintiff. The said letter mentioned that the contract duration of the subcontract of the plaintiff began on 6 March 2013. However, the evidence D showed that the loading out instruction was only issued on 25 May 2013. Therefore, to say that the subcontract of the plaintiff has yet to be completed by 9 June 2013 was incorrect and misconceived. Further, the allegation that the plaintiff as subcontractor had demobilised the marine spread, is also incorrect. It was Captain Hamzah, the defendant's representative, who had demobilised E the same on 13 July 2013, when he resigned.

**[120]** Hence the termination by the defendant was without just cause and therefore wrongful. It must therefore necessarily follow that the plaintiff is entitled to damages for the wrongful termination of the same.

F

CONCLUSION

**[121]** Given the aforesaid the learned High Court judge was plainly wrong in G coming to the conclusion that the plaintiff was in breach of the MTCE contract.

**[122]** As the MTCE contract was unlawfully terminated, the plaintiff is entitled to damages for wrongful termination.

H

**[123]** We allowed the appeal with costs here and below. The order of the learned High Court judge is set aside and judgment to be entered in favor of the appellant/plaintiff with the result that the counterclaim is dismissed. Damages to be assessed for wrongful termination of the contract.

I

*Order accordingly.*

Reported by Ashok Kumar